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**UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA AT JUNEAU**

MYRNA I. JOHNSON,
 Plaintiff,
 vs.
 FRED MEYER STORES, INC., and
 JAIME SAN MIGUEL,
 Defendants

Case No. J-04-008 CV (RRB)

MOTION FOR ORDER REOPENING DISCOVERY AND OTHER RELIEF

On August 18, 2006, this Court granted plaintiff's Motion to Reopen Discovery over objection of defendant Fred Meyer. The Order allowed plaintiff to take two additional depositions limited to 2 hours apiece "unless the defendant agreed otherwise or court order is obtained." (Docket No. 54) As a result of deposition testimony obtained on October 25, 2006, Plaintiff now seeks an Order from this Court for the following relief:

1. Reopening discovery for 120 days to allow counsel to promulgate follow up discovery and take such depositions as are needed related to discipline of Jaime San Miguel and Fred Sayre in 2002 and 2003;
2. Allowing plaintiff to supplement her Opposition to Motion for Summary Judgment and Oppositions to defendants' Motions *in Limine* within 30 days after the new close of discovery;

1 3. Awarding attorneys' fees and costs pursuant to FRCP 37 should the discovery
2 confirm that Fred Meyer failed to provide records and/or Mr. San Miguel failed
3 to testify truthfully in his deposition.

4 This request directly follows up on Mary Hill's (formerly known as Mary Lucas')
5 second deposition which took place on October 25, 2006 in Portland, Oregon. Plaintiff's
6 counsel noticed her deposition "guessing" that a portion of defendants' Responses to Plaintiff's
7 Third Requests for Production [Bates Nos. 202414 – 202438G], received "late" and ten days
8 after the close of discovery in this matter, were in fact from a file of Mrs. Hill's not previously
9 disclosed in discovery and not referenced by any Fred Meyer witness or management employee
10 during their depositions.

11 In her second deposition, Mrs. Hill confirmed that those pages were part of her
12 investigation file into complaints about Mr. San Miguel.¹ [62:5/79:13] She was the regional
13 Human Resources person responsible for the Juneau Fred Meyer Store between 2001 and 2003.
14 [101:18] She was required to conduct an external investigation of these complaints because Mr.
15 San Miguel's supervisor, Mr. Fred Sayre (previously deposed in this matter), had failed to
16 respond to internal complaints about Mr. San Miguel's management practices and in particular,
17 his absence or tardiness from work on a regular basis.

18 This information was of interest as Fred Meyer has asserted as its chief defense in this
19 case that the plaintiff's departure from work, while sobbing uncontrollably, was a "walk-off"
20 from the job and voluntary quit. Mrs. Hill in deposition indicated that as a result of her
21 investigation, which involved traveling to Juneau and interviewing many of the witnesses in
22 this case, she concluded that Mr. San Miguel was not working when scheduled, was tardy on a
23 regular basis, that there was much confusion regarding the assignment of duties. [75:4] She
24 also concluded that despite this information being passed on to Mr. Sayre, the Store Director,
25 that he failed to respond or did not follow up and address complaints with Mr. San Miguel.
26 [76:8]

27 ¹ [Hill 2nd Depo. Excerpts at Exhibit "A (hereinafter all excerpts referenced by page and starting line)

1 Mrs. Hill also testified that she had numerous conversations with Mr. Sayre [70:9] yet
2 the materials produced by Fred Meyer contain no notes of those conversations. [69:16] She
3 testified that as a result of her investigation, Mr. San Miguel received the final stage of
4 progressive discipline before actual discharge, a "Last and Final Written Warning". [92:1] As
5 a result of Mr. Sayre's failure to supervise Mr. San Miguel, and other deficiencies, she believed
6 he was also subsequently disciplined. [93:17]

7 Mrs. Hill also testified that being tardy, failing to show up for work or leaving late,
8 were attendance issues addressed by the progressive discipline system. If a manager shows up
9 late, they would normally be verbally counseled. If it continued, they could receive a written
10 warning. [84:23] If a manager leaves a shift early without giving notice, that would be
11 addressed by the progressive discipline system. [86:13] If a manager leaves early for
12 personal/children issues, it would be considered an attendance matter addressed initially by
13 counseling. [86:24]

14 The extensive external investigation conducted into Mr. San Miguel's conduct and his
15 and Mr. Sayre's discipline were never revealed by Fred Meyer in the normal course of
16 discovery nor discussed in their depositions. In fact, Mr. San Miguel denied being subject to
17 any discipline except for one instance in 1996 involving matters unrelated to attendance. But
18 for the Court reopening discovery over the defendants' objection, the dots would never have
19 been connected between the unidentified investigation file produced after the close of discovery
20 and Mrs. Hill's testimony confirming the investigation, the conclusion that Mr. San Miguel
21 violated store policies, and in a situation far more egregious than the one at issue in this matter,
22 Mr. San Miguel was subject to the progressive discipline process. His failure to show up for
23 work on time was not treated as a "walk-off" or quit.

24 Had this information been produced, plaintiff could have inquired in more depth with
25 any number of witnesses, including Mr. Sayre (the Store Director who rubber-stamped Mr. San
26 Miguel's decision that Ms. Johnson's departure was a "walk-off"); Ms. Havard (who replaced
27 Ms. Johnson and whose complaints about Mr. San Miguel were confirmed by Fred Meyer's
28 own investigation); Mr. San Miguel himself (who never was asked any questions about this
investigation or the contradiction between his testimony that he was subject to no discipline and

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Mrs. Hill's statement that he was disciplined at the final stage before termination); various Fred Meyer upper-level management individuals (none of whom were questioned about these issues because they were unknown at the time of the depositions).

Finally, the late discovery of this important information, which also goes to Fred Meyer's own practices, and is at issue whether Mrs. Johnson is found to be a "for cause" employee or "at will" were never the subject of additional discovery and plaintiff did not have the opportunity to provide the Court with any of this information in the motions currently before the Court for decision.

At a minimum, this information was clearly discoverable and should have been produced in the regular course of discovery to allow plaintiff to pursue it. The failure to timely provide this information leaves many questions unanswered and threatens to turn the discovery process on its head. Plaintiff has no explanation for the absence of this information from Mr. San Miguel's personnel file. Plaintiff has not been able to inquire of anyone at Fred Meyer, other than Mrs. Hill as to why this investigation was omitted and the discipline not revealed within the normal course of discovery.

The delays in providing the information were the defendants'. This matter has been diligently prosecuted since last December with the plaintiff taking depositions and routinely requesting information in a timely fashion. It is reasonable to reopen discovery and reasonable to allow plaintiff to supplement her current motion practice with any additional information that is obtained. Finally, should discovery demonstrate that Fred Meyer and/or Mr. San Miguel failed to provide information as requested, then plaintiff should be allowed pursuant to FRCP 37 to be awarded fees and costs directly resulting from that discovery abuse.

DATED this 8th day of November, 2006 at Juneau, Alaska.

Respectfully submitted,
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PROOF OF SERVICE

STATE OF ALASKA, FIRST JUDICIAL DISTRICT AT JUNEAU

I am employed in the City and Borough of Juneau, State of Alaska.. I am over the age of 18 and not a party to the within action. My business address is 424 N. Franklin Street, Juneau, AK 99801.

On November 8, 2006, I served the foregoing document described as MOTION FOR ORDER REOPENING DISCOVERY AND OTHER RELIEF, on the interested parties in this action by serving the original true copies, addressed as follows:

James Dickens
Miller Nash LLP
Attorney For: Fred Meyers
4400 Two Union Square
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Seattle, WA 98101-2352
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☐ By mail, I deposited such envelope(s) in the mail at Juneau, Alaska, with postage thereon fully prepaid.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Juneau, Alaska, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

☐ By personal service, I delivered such envelope(s) by hand to the ☐ office(s); ☐ the court box of the addressee(s)..

☐ By facsimile, I transmitted such documents from Juneau, Alaska, to the offices of the addressee(s).

☐ By email, I transmitted such documents from Juneau, Alaska, to the email address of the addressee(s).

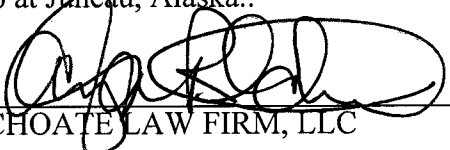
☐ By electronic service through the court of record's electronic service system,.

☐ (State) I declare under penalty of perjury under the laws of the State of Alaska that the foregoing is true and correct.

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1 ☒ (Federal) I declare that I am employed in the office of a member of the Bar of
2 this Court, at whose direction the service was made.

3 Executed on November 8, 2006 at Juneau, Alaska..

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